United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1092

No. 74-1092

OVERSEAS AFRICAN CONSTRUCTION CORPORATION

and

ST. PAUL MERCURY INSURANCE COMPANY

Plaintiffs-Appellants-Cross-Appellees

v.

EUGENE McMULLEN, Deceased, by GEORGE McMULLEN, Executor

and

JOHN D. McLELLAN, JR., Deputy Commissioner
United States Employees Compensation Commission
Second Compensation District

Defendants-Appellees-Cross-Appellants

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOURTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE-CROSS-APPELLANT JOHN D. McLELLAN, JR., Deputy Commissioner

WILLIAM J. KILBERG
Solicitor of Labor

JAMES G. JOHNSTON
Associate Solicitor

GEORGE M. LILLY
JOSHUA T. GILLELAN, II
Attorneys
Room 4221
U.S. Department of Labor
14th St., & Constitution Avenue, N.W.
Washington, D. C. 20210
Attorneys for Defendant-Appellee-Cross-Appellant McLellan

INDEX

TABLE OF CONTENTS

	Page
Questions Presented	2
Statement of the Case	3
Argument	
I. The court below correctly determined that there was substantial evidence in the record before the deputy commissioner to support his conclusion that McMullen's employment, on a harbor improvement project paid for by the United States and supervised exclusively by the U.S. Army Corps of Engineers, was within the coverage of the Defense Base Act.	5
II. The Court below erred in charging legal fees incurred by McMullen after November 26, 1972 against his award of compensation, rather than against St. Paul as required by Longshoremen's Act § 28(a), and the case should be remanded for apportionment of the approved legal fee.	15
Conclusion	24
Certificate of Service	26

TABLE OF CITATIONS

CASES

Ahmed's Case, 278 Mass. 180, 179 N.E. 684 (1932) . . .	18
Alaska Airlines v. O'Leary, 216 F. Supp. 540 (W.D. Wash. 1963), vacated, 336 F.2d 668 (9th Cir. 1964)	11
Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968)	7

Page

Bradley v. School Board of Richmond, 472 F.2d 318 (4th Cir. 1972), cert. granted, 412 U.S. 937 (1973). . 23

Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469 (1947) 7,8,11

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 23

Davis v. Department of Labor, 317 U.S. 249 (1942) . . . 7

Hurley v. Lowe, 168 F.2d 553 (D.C. Cir.), cert. denied, 334 U.S. 828 (1948) 8

McBurney v. Carson, 99 U.S. 567 (1878) 21

Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640 (2d Cir.), cert. denied, 382 U.S. 835 (1965) 7,14

Northcross v. Board of Education, 412 U.S. 427 (1973) . 23

O'Keeffe v. Smith Associates, 380 U.S. 359 (1965) . . . 7

O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951) . . 7

Sampeyreac v. United States, 32 U.S. (7 Pet.) 221 (1833) 18

Thompson v. School Board of Newport News, 472 F.2d 177 (4th Cir. 1972) 22,23

Untersinger v. United States, 181 F.2d 953 (2d Cir. 1950) 20,23

Western Newspaper Union v. Dee, 108 Neb. 303, 187 N.W. 919 (1922) 19

STATUTES — Page

Defense Base Act of August 16, 1941, 55 Stat. 622, as amended, 42 U.S.C. § 1651 et seq. 3,5,6,8,11

§ 1(a)(4), 42 U.S.C. § 1651(a)(4) 12,13,14
§ 1(a)(5), 42 U.S.C. § 1651(a)(5) 8,9,10,12,13,14
§ 1(b)(1), 42 U.S.C. § 1651(b)(1) 6,12,13

Emergency School Aid Act of 1972, P.L. 92-318 Title VII, § 718, 86 Stat. 235, 369, 20 U.S.C. § 1617 (Supp. II, 1972) 22

Foreign Assistance Act of 1961, P.L. 87-195, 75 Stat. 424 12

§§ 201-205, 75 Stat. 426-27, as amended, 22 U.S.C. § 2161 et seq. 10

§ 642(a)(2), 75 Stat. 460 9
§ 642(b), 75 Stat. 460 9

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq. 3,5

§ 20(a), 33 U.S.C. § 920(a) 11
§ 26, 33 U.S.C. § 926 2,4,15,20,23
§ 28(a)(repealed), 33 U.S.C. § 928(a) (1970 ed.). . 4,16,19
§ 28(a), as amended, 33 U.S.C. § 928(a) (Supp. II, 1972) 4,15,16,17,20,22,23,24

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, P.L. 92-576, 86 Stat. 1251

§ 13, 86 Stat. 1259 16
§ 22, 86 Stat. 1265 17

Mutual Security Act of 1954, August 26, 1954, c. 937, 68 Stat. 832 (repealed 1961) 9,10

Mutual Security Act of 1958, P.L. 85-477, 72 Stat. 261 (repealed 1961) 9,10

MISCELLANEOUS

	Page
Annot., "Validity of statutory provisions for attorneys' fees," § VI, 90 A.L.R. 530, 537-39 (1934)	23
Council of State Governments, "Workmen's Compensation and Rehabilitation Law," in Suggested State Legislation (1963, 1965)	18
3 A. Larson, The Law of Workmen's Compensation § 83.11 .	18
§ 83.12 .	18
§ 83.17 .	18
33 U.S.C.A. § 926, "Notes of Decisions"	20

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1092

OVERSEAS AFRICAN CONSTRUCTION CORPORATION

and

ST. PAUL MERCURY INSURANCE COMPANY

Plaintiffs-Appellants-Cross-Appellees

v.

EUGENE McMULLEN, Deceased
By GEORGE McMULLEN, Executor

and

JOHN D. McLELLAN, JR., Deputy Commissioner
United States Employees Compensation Commission
Second Compensation District

Defendants-Appellees-Cross-Appellants

BRIEF FOR DEFENDANT-APPELLEE-CROSS-APPELLANT JOHN D. McLELLAN, JR., DEPUTY COMMISSIONER

QUESTIONS PRESENTED

The appeal filed herein by plaintiffs Overseas African Construction Corporation and St. Paul Mercury Insurance Company presents for review the question

1. Whether the court below committed reversible error in finding that there was a rational basis in the record evidence for the deputy commissioner's conclusion that McMullen's employment, on a harbor improvement project paid for by the United States and supervised solely by the U.S. Army Corps of Engineers, was within the coverage of the Defense Base Act.

The cross appeal by defendant McLellan presents the additional question

2. Whether the court below erred in creating a lien on the award of compensation for McMullen's attorney's fees and expenses, when such fees and expenses incurred after November 26, 1972 were required by statute to be assessed against plaintiffs in addition to the award of compensation.

The cross appeal filed herein by defendant McMullen will present a further question with respect to the applicability to the proceedings below of Longshoremen's and Harbor Workers' Compensation Act § 26, 33 U.S.C. § 926, providing for assessment of costs against a party who institutes or continues proceedings pursuant to that Act without reasonable grounds.

STATEMENT OF THE CASE

Defendant-appellee-cross-appellant McLellan (hereinafter "the deputy commissioner") concurs fully in the Statement of Facts contained in the Brief for Plaintiffs-Appellants-[Cross-] Appellees, Overseas African Construction Corporation (hereinafter "Overseas African") and St. Paul Mercury Insurance Company (hereinafter "St. Paul"), at 3-5.[1/]

The court below, in its Memorandum and Order of November 21, 1973, found that the deputy commissioner's determination that McMullen's employment was within the coverage of the Longshoremen's and Harbor Workers' Compensation Act,[2/] as extended by the Defense Base Act,[3/] was supported by substantial evidence in the record before him. The court also rejected contentions by St. Paul that McMullen's claim for compensation was not timely filed; that there was no proper party to receive the award of

---

1/Said Statement of Facts is drawn verbatim, with several slight omissions, from the Memorandum and Order of the court below at 2-7, reprinted in the Appendix for Plaintiffs-Appellants-[Cross-] Appellees (hereinafter "St. Paul's App.") at 29a-32a.

2/Act of March 4, 19[illegible], 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq.

3/Act of August 16, 1941, 55 Stat. 622, as amended, 42 U.S.C. § 1651 et seq.

compensation, since McMullen died during the pendency of the claim before the deputy commissioner; and that there was no medical evidence that McMullen's disabling neurodermatitis arose out of his employment.[4/]

The court below also rejected the counterclaim filed by McMullen for assessment of costs and attorneys' fees against St. Paul. That counterclaim was based on McMullen's contention that the proceedings below were "* * * instituted or continued without reasonable ground * * *" within the meaning of Longshoremen's and Harbor Workers' Compensation Act (hereinafter "Longshoremen's Act") § 26, 33 U.S.C. § 926. The court concluded, however, that "Although we believe the action lacking in merit, we cannot say that plaintiff's position was frivolous or malicious." Memorandum and Order at 13, St. Paul's App. 37a. Thereafter McMullen requested reconsideration of the attorney's fee question,[5/] directing the court's attention to Longshoremen's Act § 28(a), 33 U.S.C. § 928(a), in addition to the provision of § 26, supra. St. Paul's App. 41a, 45a. The

---

4/These contentions are not renewed by St. Paul before this Court, and appear to have been abandoned.

5/Such request was made by letter from McMullen's attorney to the Judge who presided below. St. Paul's App. 40a-46a.

court treated this request "as a motion to reargue" the previous Memorandum and Order, and granted the motion in an Order dated December 3, 1973. St. Paul's App. 47a. This Order provided, however, that

> On such reargument, the prior determination of the Court is adhered to, and in addition, the Court fixes the reasonable value of the legal services rendered to the Estate of Eugene McMullen, deceased, in this action at the sum of $1,800.00, which shall be a lien on the judgment recovered, in addition to the lien previously imposed for services prior to the entry of the award before the Deputy Commissioner, * * *. Id. (emphasis added).

This appeal by the deputy commissioner, from the underlined portion of the above Order, followed.

St. Paul Mercury still has not paid the $15,014.60 (St. Paul's App. 39a) for which the court below entered judgment against it.

ARGUMENT

I

THE COURT BELOW CORRECTLY DETERMINED THAT THERE WAS SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE DEPUTY COMMISSIONER TO SUPPORT HIS CONCLUSION THAT McMULLEN'S EMPLOYMENT, ON A HARBOR IMPROVEMENT PROJECT PAID FOR BY THE UNITED STATES AND SUPERVISED EXCLUSIVELY BY THE U.S. ARMY CORPS OF ENGINEERS, WAS WITHIN THE COVERAGE OF THE DEFENSE BASE ACT.

The deputy commissioner, in his compensation order filed June 22, 1972, found as trier of the facts that the project at which Eugene McMullen was employed by Overseas African involved "public work" within the meaning of Defense Base Act § 1(b), 42 U.S.C. § 1651(b); that the United States Army Corps of Engineers supervised the project and certified the completion of segments thereof; that upon such certification, payment was made by the Agency for International Development, U.S. Department of State; and that Overseas African believed that its employees on the project were within the coverage of the Defense Base Act, and therefore insured its obligations under that Act. Compensation Order at 1-2, St. Paul's App. following 6a. From these facts, the deputy commissioner concluded "* * * that the employment under the contract comes within the jurisdiction of the Defense Base Act[.]" Id. at 2.

The Defense Base Act, supra n.3, provides for application of the Longshoremen's and Harbor Workers' Compensation Act, supra n.2, to employment under certain described circumstances. The scope of review of compensation orders issued under the Longshoremen's Act and its statutory extensions is well-established. If the findings of the deputy commissioner are

supported by substantial evidence, O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951); Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 467 (1968), or if the deputy commissioner's holding is not "irrational," O'Keeffe v. Smith Associates, 380 U.S. 359, 363 (1965), or if the order under review "is not forbidden by the law," Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 478 (1947), the determination of the deputy commissioner must be sustained. This principle is equally applicable to jurisdictional findings. Davis v. Department of Labor, 317 U.S. 249, 256-57 (1942); Cardillo v. Liberty Mutual Ins. Co., supra, 330 U.S. at 474; Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645-46 (2nd Cir.), cert. denied, 382 U.S. 835 (1965). That the basic facts are undisputed, and the deputy commissioner's inference of which review is sought is a legal one, does not give rise to a different scope of review. Cardillo, supra, 330 U.S. at 478; O'Keeffe v. Smith Associates, supra. Of course this does not mean that such an inference is unreviewable, or that the court is "bound by the findings below,"[6/] and the court below did not so find. But it does mean that the reviewing court's function is exhausted when it

---

6/Brief for Plaintiffs-Appellants-[Cross-]Appellees at 10.

finds a "reasonable legal basis" for the deputy commissioner's award. Cardillo, supra, 330 U.S. at 479. See Hurley v. Lowe, 168 F.2d 553 (D.C. Cir.), cert. denied, 334 U.S. 828 (1948). The court below found such a reasonable basis, and indeed, as its memorandum opinion shows, fully agreed with the deputy commissioner's finding that McMullen's employment was within the coverage of the Defense Base Act.

The controversion of jurisdiction by St. Paul has been at all stages of this proceeding based on an incomplete reading of the Defense Base Act. The letter from the Agency for International Development (hereinafter "A.I.D.") to the deputy commissioner (St. Paul's App. opposite 8a), which was received after the hearing but was made part of the record, indicates that A.I.D.'s payments for the work done on Overseas African's project were "development loan" funds. St. Paul's argument, both in the court below and in its Brief to this Court, is aimed at establishing that this letter showed conclusively that the contract under which McMullen was employed was not within Defense Base Act § 1(a)(5), 42 U.S.C. § 1651(a)(5). That clause of the Act provides for coverage of employment on any contract

> * * * approved and financed by the United States or any * * * agency thereof * * *, where such contract is to be performed outside the continental United States, under the Mutual Security Act of 1954, as amended (other than title II of chapter II thereof * * *) * * *.

The provision referred to in the parenthetical exclusion at the end of the above-quoted statutory language, Title II of Chapter II of the Mutual Security Act of 1954, as amended, was the portion of that Act relating to "development loans," which was codified to 22 U.S.C. § 1871 et seq. See Mutual Security Act of 1958, P.L. 85-477, 72 Stat. 261, set out in relevant part in the Brief for Plaintiffs-Appellants-[Cross-] Appellees at Add. 4-8. The Mutual Security Act of 1954, as amended (which included the Mutual Security Act of 1958), was repealed[7/] by § 642(a)(2) of the Foreign Assistance Act of 1961, P.L. 87-195, 75 Stat. 424, 460. Section 642(b) of that Act provided, however, that

> References in law to the Acts, or provisions of such Acts, repealed by subsection (a) of this section shall hereafter be deemed to be references to this Act or appropriate provisions of this Act. 75 Stat. 460.

7/With the exception of a few provisions not here relevant.

The development loan provisions of the Mutual Security Act were replaced by similar provisions in the Foreign Assistance Act of 1961, Part I, Chapter 2, Title I, comprising §§ 201-205 of the Act, 75 Stat. 426-27.[8/] Thus § 1(a)(5) of the Defense Base Act should now be read as covering overseas employment on contracts "* * * approved and financed * * * under the Foreign Assistance Act of 1961, as amended (other than title I of chapter 2 of part I thereof * * *)." The letter from A.I.D. to the deputy commissioner does not indicate the relationship between the parenthetical exclusion of Defense Base Act § 1(a)(5) and the fact that Overseas African's contract "* * * was totally financed on a development loan basis," St. Paul's App. opposite 8a. St. Paul did not trace that relationship before the deputy commissioner, nor did it do so for the benefit of the court below.[9/] Its brief to this Court does not do so either; indeed it fails even to mention that the Mutual Security Act of 1954, as amended by the Mutual Security Act of 1958 which is set out at length in that brief (at Add. 4-8), was repealed in 1961.

8/As amended, 22 U.S.C. § 2161 et seq.

9/See Complaint, St. Paul's App. at 3a-6a; Affidavit of Irwin B. Silverman, id. at 22a-25a; Statement Pursuant to Rule 9(g), id. at 26a-27a.

In view of St. Paul's failure to explain its contentions as to what the letter had to do with Defense Base Act coverage of McMullen's employment, it is perhaps understandable that the deputy commissioner did not find the letter to be substantial evidence of anything. Compensation order at 2-3, Finding of Fact (5), St. Paul's App. opposite 6a. It would appear, in fact, that St. Paul did not meet its burden of coming forward with substantial evidence to rebut the statutory presumption, fully applicable to Defense Base Act cases,[10/]

> [t]hat the claim comes within the provisions of this Act. Longshoremen's Act § 20(a), 33 U.S.C. § 920(a).

The deputy commissioner's award, however, and the approval thereof by the court below, need not be rested on the statutory presumption and St. Paul's failure to elucidate the relevance

---

10/Compare Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 474 (1947) with Alaska Airlines v. O'Leary, 216 F. Supp. 540, 542-43 (W.D. Wash. 1963), cited by St. Paul, Brief for Plaintiff-Appellant-[Cross-]Appellee at 9-10. The latter decision was vacated by the Court of Appeals for the Ninth Circuit without resolution of the issues presented, since the case became moot. 336 F.2d 668 (1964). The Supreme Court's use of the presumption in Cardillo related strictly to a jurisdictional question similar to that presented here; as herein; "[t]he facts pertinent to that issue [were] not seriously disputed * * *." 330 U.S. at 474.

of the letter to coverage under Defense Base Act § 1(a)(5). If all of that relevance be assumed, the project on which McMullen was employed is merely taken out of the operation of that clause of the Act. It is clear that the deputy commissioner and the court below found the project to be within § 1(a)(4) of the Act, to which St. Paul has yet to address itself.

The deputy commissioner found,[11] and the court below agreed,[12] that Overseas African's project at Chisimaio, Somalia was a "public works" project within the statutory definition thereof, Defense Base Act § 1(b)(1), 42 U.S.C. § 1651(b)(1). Contracts need not be for "public works" to be within § 1(a)(5); they need only be (1) approved and financed by the United States, (2) for performance outside the continental United States, (3) financed under the Foreign Assistance Act of 1961, as amended, and (4) not financed under the "development loan" provisions of that Act. The purpose of the project is irrelevant. Coverage under § 1(a)(4), however, stands on a different footing; the contract must be (1) either with some arm of the United States government, or a subordinate contract with respect to such a contract, (2) for performance outside

---

11/Compensation order at 2, St. Paul's App. opposite 6a.

12/Memorandum and Order at 10, St. Paul's App. 34a-35a.

the continental United States, and (3) "for the purpose of engaging in public work." Thus while coverage under § 1(a)(5) turns on the source of funding for the contract, irrespective of the work to be done, applicability of § 1(a)(4) depends on whether the contract involves "public work," as defined in § 1(b)(1), regardless of the statutory authority for the funding of the project. It is clear from the compensation order that the deputy commissioner found the "Chisimaio Port and Municipal Facilities"[13/] project to be one involving "public work." Compensation order at 2, St. Paul's App. opposite 6a. The court below similarly found that "surely" the project, involving as it did "harbor improvements," was within the Act's definition of "public work." Memorandum and Order at 10, St. Paul's App. 34a-35a. Thus although neither referred specifically to it, both the deputy commissioner and the court below clearly found McMullen's claim to be within § 1(a)(4) of the Defense Base Act. And St. Paul does not here appear to challenge such finding.

13/St. Paul's App. opposite 8a.

Thus St. Paul's argument has been based all along on its erroneous assumption that "development loan" funding precluded Defense Base Act coverage of Overseas African's project at Chisimaio, Somalia. While such funding could indeed have been shown to take the project out of § 1(a)(5) of the Act, it can have no effect on the question of coverage under § 1(a)(4).

This Court has said, in conformity with the standards established by the Supreme Court, that

> * * * a federal compensation award must be upheld if there is a reasonable argument for coverage under the Longshoremen's Act. Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 646 (2nd Cir.), cert. denied, 382 U.S. 835 (1965).

St. Paul has presented no argument, reasonable or otherwise, why McMullen's employment on the public work project at Chisimaio is not within Defense Base Act § 1(a)(4). The court below, affirming the deputy commissioner's determination, found it to be clearly within that clause, and that decision should be affirmed.

II

THE COURT BELOW ERRED IN CHARGING LEGAL FEES INCURRED BY McMULLEN AFTER NOVEMBER 26, 1972 AGAINST HIS AWARD OF COMPENSATION, RATHER THAN AGAINST ST. PAUL AS REQUIRED BY LONGSHOREMEN'S ACT § 28(a), AND THE CASE SHOULD BE REMANDED FOR APPORTIONMENT OF THE APPROVED LEGAL FEE.

McMullen's attorney, in his November 30, 1973 letter to the court below, St. Paul's App. 40a-46a, requested reconsideration of the question of who should bear the expense of his fee. He argued once again that St. Paul had acted in bad faith in instituting proceedings in that court, and should therefore bear McMullen's expenses of defending against that action, pursuant to Longshoremen's Act § 26, 33 U.S.C. § 926. He also pointed out to the court that § 28 of the Longshoremen's Act, 33 U.S.C. § 928, had been

> * * * amended November 26, 1972 and under the new Section 928(a) the carrier is now liable for attorneys' fees where a claimant is successful in his claim. It is thus the intention of Congress to hold [the] carrier responsible for attorneys' fees and not to charge the claimant for same.

> Based on the unreasonable actions of the insurance carrier and the new Section 28(a) supra, it is requested that the carrier be charged * * * for attorneys' fees to be paid separate and apart from all compensation that may be due and payable to the Estate of Eugene McMullen. St. Paul's App. 45a.[14]

The Court, however, allowed a lien on McMullen's compensation for $1,800.00 in favor of his attorney for representation before it. Order of December 3, 1973, St. Paul's App. 47a. This course of action was the manner specified for approval of claimants' attorney fees by Longshoremen's Act § 28(a), from the passage of the Act in 1927 until 1972.

Section 28, entitled "Fees for Services," was amended by § 13 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Public Law 92-576, 86 Stat. 1251, 1259,

---

14/ The letter is ambiguous as to whether the amended § 28(a) is cited as an alternative ground for the requested action, or merely as supportive evidence of Congressional approval of such action. In either case, the attention of the court was specifically directed to the amended section.

effective November 26, 1972.[15] As amended, § 28[16] requires that a successful claimant's attorney's fees and expenses be paid by his employer, where, as here, the employer has controverted the claim. The new provision constitutes Congressional recognition that the benefits provided by the Act should not be reduced by requiring the injured employee to pay the cost of establishing his right to compensation.

15/Public Law 92-576 § 22 provided:

> The amendments made by this Act shall become effective thirty days after the date of enactment of this Act [October 27, 1972]. 86 Stat. 1265.

16/Section 28(a), as amended, provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final. 86 Stat. 1259, 33 U.S.C. § 928(a) (Supp. II, 1972) (emphasis added).

See 3 Larson, The Law of Workmen's Compensation §§ 83.11, 83.12, and 83.17. A growing number[17] of states have adopted similar provisions, and the section adopted by Congress is that drafted by the Council of State Governments.[18]

The amendment is in terms fully applicable to cases pending at the time of its enactment, as well as those arising thereafter. Neither it nor the act of which it was a part contains a "savings clause" excepting from its operation cases arising or pending prior to its effective date. "Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed." Sampeyreac v. United States, 32 U.S. (7 Pet.) 221, 238 (1833).

Analogous amendments to state workmen's compensation statutes have been applied to claims arising before their passage. One of the two claims under review in Ahmed's Case, 278 Mass. 180, 179 N.E. 684 (1932), concerned an injury which had occurred in 1929. Between the time of the injury and the appeal, the legislature had passed a statute providing that whenever an employer should appeal an award by an individual compensation board member to the full board, and the board should order any

---

17/3 Larson, supra, § 83.12 nn. 83.1, 86, at 62-64 (1973 Cumm. Supp.).

18/Council of State Governments, "Workmen's Compensation and Rehabilitation Law," in Suggested State Legislation, 1963 and 1965, reprinted in 3 Larson, supra, § 83.17 at 354.17-.18.

compensation continued, the employer would be liable for the payment of the claimant's costs, including an attorney's fee. The court held this provision applicable, notwithstanding that the injury occurred before the passage of the amendment, since the appeal to the board for defense of which the fee was allowed occurred after the amendment's effective date.

Similarly, in Western Newspaper Union v. Dee, 108 Neb. 303, 187 N.W. 919 (1922), a 1919 amendment providing that insurers pay the attorney fees of successful claimants was held applicable to a claim on an injury prior thereto.

> Though this provision was inserted by amendment after [claimant] was injured, the attorney's fee relates to the remedy and may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed. * * * An attorney's fee, therefore, was properly taxed in the district court * * *. 187 N.W. at 921.

Prior to its amendment, § 28 specifically provided that any approved fee for legal services on behalf of a compensation claimant "* * * shall * * * be a lien upon such compensation." Longshoremen's Act § 28(a), 33 U.S.C. § 928(a) (1970 ed.). When St. Paul controverted McMullen's claim before the deputy commissioner, the statutory directive that claimants bear the cost of establishing their right to compensation was in force.

Similarly when it instituted proceedings in the court below, St. Paul thought that it could do so with impunity, so long as McMullen could not convince the court that it had done so "without reasonable ground" so as to bring the case within § 26 of the Act, 33 U.S.C. § 926.[19/] Nevertheless, as the above cases demonstrate, St. Paul had no vested right in the particular form and incidents of McMullen's remedy existing at the time of his becoming disabled; on the effective date of the amendment to § 28, St. Paul was on notice that, should it lose, it would be liable for expenses incurred thereafter by McMullen in defending the award of compensation. It was not, however, entrapped by its former actions into liability for expenses incurred prior thereto, for

> * * * it is the general rule that, while procedural statutes do apply to pending litigation, they have no retroactive effect upon any steps that may have been taken in the action before they are passed. Untersinger v. United States, 181 F.2d 953, 955-56 (2d Cir. 1950) (L. Hand, J.) (footnotes omitted).

19/Courts have been extremely reluctant to assess litigation expenses under § 26, finding "reasonable ground[s]" in any colorable argument, however lacking in merit. The "Notes of Decisions" following the section in United States Code Annotated reveal that not a single reported decision has awarded costs under § 26 since its enactment in 1927.

Thus had St. Paul withdrawn its controversion of the compensation award herein before the effective date of the amendment, and paid the compensation to which McMullen was entitled, it could have avoided liability for his attorney's fee. By continuing to oppose the claim after November 26, 1972, however, St. Paul undertook the risk which Congress imposed on employers and their insurers controverting claims thereafter - the risk that if in fact the claim it was opposing was a valid one, it would be liable for all the costs of establishing that validity.

In McBurney v. Carson, 99 U.S. 567 (1878), the Supreme Court rejected an argument that an act "cannot apply to a suit pending when it is passed." The act in question, the Court held,

> * * * was not applied retrospectively but only [with respect to events after its effective date]. * * * There is no reason why it should not be so applied. It is a remedial statute, and should be liberally construed to accomplish the end in view. This construction is abundantly supported by well-considered authorities. 99 U.S. at 569.

Thus, while St. Paul's initial denial of liability to McMullen under the Act, and its institution of the action in the court below (if it had reasonable grounds therefor), should perhaps not be made to occasion liability for his attorney fees, its maintenance of that position after the effective date of the amendment can without the least injustice give rise to such liability for the legal expenses resulting therefrom.

The United States Court of Appeals for the Fourth Circuit has recently held en banc that a parallel provision in the Emergency School Aid Act of 1972,[20/] for the award of attorneys' fees in desegregation cases, is applicable to pending cases in precisely the manner herein suggested with respect to § 28(a).

> The Court is unanimously of the view that it should apply § 718 to any case pending before it after the Section's enactment. * * *
>
> A majority of the Court, however, is of the view that only legal services rendered after the effective date of § 718 are compensable under it. * * *
>
> A minority of the Court would apply § 718 to legal services, whenever rendered, in connection with school litigation culminating in an order entered after [such date]. * * * Thompson v. School Board of Newport News, 472 F.2d 177, 178 (4th Cir. 1972) (emphasis added).

The Supreme Court has held that an analogous provision for recovery of attorney fees in stockholders' derivative actions, at least when applied only to costs incurred after the date of

---

20/Public Law 92-318 § 718, 86 Stat. 235, 369, 20 U.S.C. § 1617 (Supp. II, 1972).

enactment, fully satisfied due-process requirements although applied to pending cases. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 553-54 (1949).[21/]

Thus if this Court determines that the court below was correct in finding this case was not to be within the purview of Longshoremen's Act § 26, McMullen's representation should be apportioned into services rendered before November 26, 1972, when § 28(a), as amended, took effect, and those rendered thereafter. The latter cannot be made a lien on McMullen's compensation, but rather must be charged against St. Paul in addition to the award of compensation benefits. Such apportionment will effectuate the reasonable expectations of the parties, and will satisfy the demands of the amended § 28 interpretted according to the "general rule" stated by Judge Hand in Untersinger, supra, followed by the Fourth Circuit in Thompson, supra, and approved by the Supreme Court in Cohen, supra.

21/Finding that the statute in question did "not appear to require an interpretation that it creates new liability * * * for [litigation] expenses incurred * * * previous to its enactment," the Court "express[ed] no opinion" as to the validity of such an application. Ibid. But see Bradley v. School Board of Richmond, 472 F.2d 318, 332 (4th Cir. 1972) (dissenting opinion of Winter, J.), cert. granted, 412 U.S. 937 (1973); cf. Northcross v. Board of Education, 412 U.S. 427, 429 n.2 (1973). See also Annot., "Validity of statutory provisions for attorneys' fees," § VI, 90 A.L.R. 530, 537-39 (1934).

Additionally, in the event that this Court affirms the deputy commissioner's award of compensation to McMullen, whether or not this appeal by St. Paul was instituted without reasonable ground, a fee for McMullen's attorney's representation of him before this Court in defense of said award should be granted against St. Paul, in accordance with the mandate of § 28(a), as amended.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed insofar as it dismissed Plaintiffs-Appellants-Cross-Appellees' Complaint. Unless this Court finds that, as contended by McMullen, the proceedings below were instituted without reasonable grounds, the case should be remanded to the court below for assessment of the approved fee of McMullen's attorney between fees for services rendered

prior to November 26, 1972, and those for services rendered after such date, with directions that judgment for the latter be entered in favor of said attorney against St. Paul Mercury Insurance Company, and that the lien on the judgment below be reduced by such amount.

Respectfully submitted,

WILLIAM J. KILBERG
Solicitor of Labor

JAMES G. JOHNSTON
Associate Solicitor

GEORGE M. LILLY
JOSHUA T. GILLELAN, II
Attorneys
U.S. Department of Labor
Room 4221 - Main Labor Building
Washington, D.C. 20210
202-961-4598

Attorneys for Defendant-Appellee-
Cross-Appellant John D. McLellan, Jr.,
Deputy Commissioner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Defendant-Appellee-Cross-Appellant John D. McLellan, Jr., Deputy Commissioner, was served on

Jacowitz & Silverman
44 Court Street
Brooklyn, New York 11201

Attorneys for Plaintiffs-Appellants-Cross-Appellees

and on

Angelo C. Gucciardo, Esq.
Israel, Adler, Ronca & Gucciardo
160 Broadway
New York, New York 10038

Attorney for Defendant-Appellee-Cross-Appellant McMullen

by mailing copies thereof to said attorneys by certified air mail, postage prepaid, on MAR 29 1974.

JOSHUA T. GILLELAN, II
Attorney
United States Department of Labor